

1 NOT FOR PUBLICATION
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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Andrew Lockett,

10 Petitioner,

11 v.

12 David Shinn, et al.,

13 Respondents.
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No. CV-19-04717-PHX-SRB

ORDER

15 Petitioner Andrew Lockett was convicted of a felony in Arizona state court on June
16 27, 2018 after pleading guilty. He filed a Notice of Post-Conviction Relief on August 28,
17 2018 which is still pending before the trial court. On July 19, 2019 Petitioner filed this
18 Petition under 28 U.S.C. §2254 for a Writ of Habeas Corpus. On January 27, 2020, the
19 Magistrate Judge issued her Report and Recommendation recommending that the Petition
20 be dismissed without prejudice because the three factors supporting *Younger* abstention are
21 present ¹ and because Petitioner has not exhausted his state remedies. The Magistrate Judge
22 found no extraordinary circumstances that would except Petitioner from *Younger*
23 abstention and no absence of an available state corrective process or circumstances that
24 would render state process ineffective. Petitioner filed timely written Objections to which
25 Respondents filed a Response in Opposition.

26 Petitioner first claims that only one of the three *Younger* factors is met; namely that
27 state proceedings are ongoing. Petitioner argues in his Objection that he does not have an
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¹ *Younger v Harris*, 401 U.S. 37 (1971).

1 adequate opportunity to litigate his federal claims in state court. Petitioner is wrong.
2 Petitioner's challenge to his arrest warrant on Fourth Amendment grounds is a matter that
3 must first be raised and exhausted in his state post-conviction relief proceedings before he
4 can seek federal habeas relief. The fact that he claims he was not given the opportunity to
5 litigate this issue before his conviction does not excuse his obligation to raise this claim in
6 his post-conviction relief petition and exhaust available state remedies.²

7 This Court concludes, as did the Magistrate Judge, that all three *Younger* factors are
8 present and abstention is required. This case does not present, nor has Petitioner argued,
9 any extraordinary circumstances that would allow this Court to proceed while state
10 proceedings were pending.

11 The gist of Petitioner's Objections concerning the Magistrate Judge's
12 recommendation for dismissal without prejudice on the alternative grounds of failure to
13 exhaust appears to be a claim that he has already tried and failed to convince the state court
14 to address his constitutional claim and has, therefore, exhausted his state court remedies.
15 But from his Objection it is clear that this attempt was made before his conviction and not
16 in his pending post-conviction relief petition. Whatever prior attempts Petitioner made to
17 bring his constitutional claim to the state court, they did not constitute exhaustion. As the
18 Magistrate Judge explained Petitioner can only exhaust this claim by presenting it to the
19 trial court and if relief is not granted to the state appellate court.

20 IT IS ORDERED overruling Petitioner's Objections to the Magistrate Judge's
21 Report and Recommendation.

22 IT IS FURTHER ORDERED adopting the Report and Recommendation of the
23 Magistrate Judge as the Order of this Court. (Doc. 14)

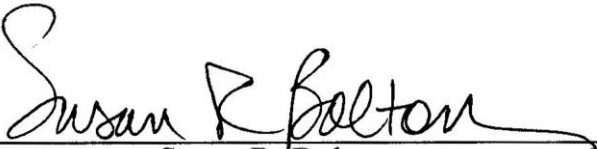
24 _____
25 ² Petitioner does not address the second *Younger* factor in his Objections except for
26 the statement that his Habeas Petition does not implicate important state interests. This
27 Court agrees with the Magistrate Judge that the state has an important interest in assessing
28 and correcting alleged violations of a defendant's rights.

1 IT IS FURTHER ORDERED granting Respondents' Motion to Dismiss and
2 dismissing the Petition Under 28 U.S.C. § 2254 For a Writ of Habeas Corpus by a Person
3 in State Custody without prejudice. (Doc. 12)

4 IT IS FURTHER ORDERED denying a Certificate of Appealability and leave to
5 proceed in forma pauperis on appeal because dismissal of the Petition is justified by a plain
6 procedural bar and jurists of reason would not find it debatable.

7 IT IS FURTHER ORDER directing the Clerk to enter judgment accordingly.
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9 Dated this 18th day of March, 2020.
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13 Susan R. Bolton
14 United States District Judge
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